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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re) Case No 11-24987-D-7
GREGORY BOS and ELIZABETH BOS,)
Debtors)

THE BOARD OF TRUSTEES, in their) Adv Pro No 11-02390-D
capacities as Trustees of THE)
CARPENTERS HEALTH AND WELFARE) Docket Control No DNL-1
TRUST FUND FOR CALIFORNIA, et)
al ,)

Plaintiffs,) DATE December 14, 2011
v) TIME 10 00 a m
GREGORY BOS,) DEPT D
Defendant)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion

MEMORANDUM DECISION

On November 2, 2011, defendant Gregory Bos ("Bos") filed a Motion for Summary Adjudication, bearing Docket Control No DNL-1 (the "Motion") Plaintiffs the Board of Trustees, in their capacities as Trustees of the Carpenters Health and Welfare Trust Fund for California, Carpenters Vacation Holiday Trust Fund for Northern California, Carpenters Pension Trust Fund for Northern California, Carpenters Annuity Trust Fund for Northern California, and Carpenters Training Trust Fund for Northern

1 California, and Northern California Carpenters Regional Council
 2 (collectively the "Plaintiffs") oppose the Motion For the
 3 reasons set forth below, the Motion will be denied

4 I INTRODUCTION

5 The following facts are not in dispute The Plaintiffs
 6 represent the interests of various trust funds -- established by
 7 a series of trust agreements -- for the benefit of carpentry
 8 workers (the "Trust Funds") The benefit plans established by
 9 the trust agreements are governed by the Employee Retirement
 10 Income Security Act, 29 U S C §§ 1001-1461 ("ERISA") Bos was
 11 the owner, operator, and active participant in the management of
 12 a business known as Bos Enterprises, Inc ("BEI") Bos did
 13 business as a contractor in the State of California as an
 14 employer within the meaning of the Labor-Management Relations
 15 Act ¹

16 / / /

17 _____
 18 1 The Motion generates some confusion over the distinction
 19 between Bos and BEI The preceding two sentences of this
 20 decision and the next one are taken directly from Bos's statement
 21 of undisputed facts, according to that statement, these are facts
 22 Bos has admitted by way of his answer to the Plaintiffs'
 23 complaint Having admitted his active role in the management of
 the business, and that he did business as a contractor in
 California as an employer, it is unclear why he maintains a
 distinction between himself and BEI for purposes of the
 Plaintiffs' fiduciary duty claim

24 However, the Motion "assumes Bos has personal liability,"
 25 but expressly does not concede the point, Motion for Summary
 Adjudication, filed on November 2, 2011 ("Motion") at 5 27-28,
 26 n 1, and the parties have not briefed the issue Thus, the court
 decides herein the only issue on which Bos seeks a ruling --
 27 whether it may be determined as a matter of law that he was not a
 fiduciary of the Trust Funds for purposes of § 523(a)(4) For
 28 simplicity, this decision will refer to the employer as Bos
 This is not meant to conclude, one way or the other, that Bos
 owes these obligations in his individual capacity

1 Bos was a member of the Modular Installers Association, an
2 employer association, and bound to a collective bargaining
3 agreement of the Carpenters' 46 Northern California Counties
4 Conference Board of the United Brotherhood of Carpenters and
5 Joiners of America (the "CBA") The Modular Installers
6 Association is bound to the collective bargaining agreement
7 through the Office Modular Systems Addendum to the CBA (the "CBA
8 Addendum")

9 Upon executing the CBA Addendum, the Modular Installers
10 Association agreed to wages, fringe benefits, and working
11 conditions set forth in the CBA The CBA required Bos to hire
12 unionized carpentry workers and compensate them for work
13 according to the terms of the CBA, one of Bos's obligations was
14 to remit monthly contributions to the Trust Funds for the purpose
15 of providing employee benefits ² On or about March 9, 2009, Bos
16 and the Trust Funds resolved a dispute over unpaid contributions
17 by way of a promissory note, signed by Bos, individually,
18 pursuant to which he promised to pay the Trust Funds the sum of
19 \$359,592 09, then due and owing for unpaid benefit contributions
20 since August of 2008 Bos failed to make payments on the note

21 The Plaintiffs' first amended complaint in this adversary
22 proceeding alleges, inter alia, a claim pursuant to 11 U S C §
23 523(a)(4) for breach of fiduciary duty

24 / / /

25 / / /

26
27 2 This fact -- that Bos was required to remit the
28 contributions to the Trust Funds -- comes directly from Bos's
statement of undisputed facts, although he then says BEI failed
to remit amounts to the Trust Funds

II ANALYSIS

This court has jurisdiction over the Motion pursuant to 28 U S C §§ 1334(b) and 157(b)(1). The Motion is a core proceeding under 28 U S C § 157(b)(2)(I). The Motion is brought pursuant to Fed R Civ P 56, made applicable in this proceeding by Fed R Bankr P 7056.³

A Standards for Summary Judgment

Where a motion for summary judgment is before the court, the court must render judgment for the movant if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v Catrett, 477 U S 317, 322-23, 106 S Ct 2548, 2552 (1986).

Once the moving party has met its initial burden, the non-moving party must show specific facts demonstrating the existence of genuine issues of fact for trial. Anderson v Liberty Lobby, Inc., 477 U S 242, 256, 106 S Ct 2505, 2514 (1986).⁴ To demonstrate the presence or absence of a genuine dispute, a party

³ As used herein, "Rule 56" means Fed R Civ P 56, as incorporated by Fed R Bankr P 7056. Unless otherwise indicated, all Code, chapter, section and other Rule references are to the Bankruptcy Code, 11 U S C §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

⁴ Pursuant to Rule 56(d), the Plaintiffs request that consideration of the Motion be deferred until discovery is complete. Plaintiffs' Opposition to Defendant's Motion for Summary Adjudication, filed November 16, 2011 ("Opp.") at 5 1-2, Declaration of Jordan D Mazur. As discussed below, since Bos has failed to establish that he is entitled to a determination of fact as a matter of law, the Motion may be decided at this time.

1 must cite to specific materials in the record, or submit an
2 affidavit or declaration by a competent witness based on personal
3 knowledge See Rule 56(c)(1), (4)

4 B The Motion Permissibly Addresses Only the Fiduciary Capacity
5 Element of Section 523(a)(4)

6 The Motion concerns a portion of the second cause of action
7 of the Plaintiffs' first amended complaint -- to determine that
8 Bos's failure to pay required trust fund contributions
9 constitutes a non-dischargeable debt under § 523(a)(4)
10 Specifically, Bos seeks to adjudicate the discrete issue of
11 whether Bos is a "fiduciary" as that term is understood under §
12 523(a)(4) The Plaintiffs contend that such partial relief is
13 impermissible under Rule 56⁵ The court disagrees

14 By its plain words, Rule 56(a) allows a party to move for
15 summary judgment on part of a claim or defense⁶ As of December
16 1, 2010, Rule 56 officially recognized partial summary judgment
17 See Rule 56(a)(caption states, "Motion for Summary Judgment or
18 *Partial Summary Judgment*") (emphasis added), Advisory Committee
19 Note to 2010 Amendment ("The first sentence [of subdivision (a)]
20 is added to make clear at the beginning that summary judgment may
21 be requested as to part of a claim or defense ") The
22 cases on which the Plaintiffs rely are no longer valid after the
23 2010 amendments to Rule 56 Therefore, Bos may obtain summary
24 adjudication on a portion of the Plaintiffs' § 523(a)(4) cause of
25

26 5 Opp at 7 24-27

27 6 "A party may move for summary judgment, identifying each
28 claim or defense - or the part of each claim or defense - on
which summary judgment is sought " Rule 56(a) (emphasis added)

1 action

2 Next, although Bos is seeking a determination that he was
3 not a fiduciary under § 523(a)(4), the relief he seeks is on the
4 entire cause of action. In other words, Bos contends that if he
5 is not a fiduciary, then the Plaintiffs' second cause of action
6 must fall in its entirety.⁷ This is simply incorrect.

7 Section 523(a)(4) provides that an individual is not
8 discharged from any debt "for fraud or defalcation while acting
9 in a fiduciary capacity, embezzlement, or larceny." The phrase
10 "while acting in a fiduciary capacity" qualifies the words "fraud
11 or defalcation," which leaves embezzlement and larceny as
12 independent avenues for establishing non-dischargeability under §
13 523(a)(4).⁸ Thus, the fiduciary capacity requirement applies
14 only to debts for fraud or defalcation, embezzlement and larceny
15 do not require the existence of a fiduciary relationship. See
16 Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125
17 (9th Cir. 2003), see also Lewis v. Scott (In re Lewis), 97 F.3d
18 1182, 1185 (9th Cir. 1996), Transamerica Commercial Fin. Corp. v.
19 Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991).

20 The Plaintiffs, therefore, correctly contend that a §
21 523(a)(4) cause of action may rest on proof of larceny or
22 embezzlement alone. proof of fiduciary fraud or defalcation is

23

24 ⁷ Motion at 4 20-21, 9 12-13, Reply to Plaintiffs'
25 Opposition to Motion for Summary Adjudication, filed on November
21, 2011 ("Reply") at 3 16-18, 26-27, 4 1, 14-16, 8 3-5.

26 ⁸ See 4 Alan N. Resnick & Henry J. Sommer, Collier on
27 Bankruptcy ¶ 523.10[1][d] (16th ed. 2011) ("The import of the
28 grammatical structure is that the discharge exception applies
even when the embezzlement or larceny was committed by someone
not acting as a fiduciary.")

1 not necessary for a party to prevail under § 523(a)(4) Since
 2 the Plaintiffs have alleged embezzlement and larceny,⁹ a
 3 determination by the court on the fiduciary capacity issue is not
 4 dispositive of the entire § 523(a)(4) cause of action

5 The Motion raises only one issue -- whether Bos is correct
 6 that, as a matter of law, he was not a fiduciary of the Trust
 7 Funds for purposes of § 523(a)(4) The court makes no findings
 8 as to fraud, defalcation, embezzlement, or larceny¹⁰

9 C Under Ninth Circuit Law, Bos May Be an ERISA Fiduciary

10 In the context of alleged ERISA violations, as is the case
 11 here, where the Plaintiffs have alleged Bos violated ERISA by not
 12 making timely fringe benefit contributions pursuant to the trust
 13 agreements, a defendant who is a fiduciary under ERISA, 29 U S C
 14 § 1002(21), is also a fiduciary for the purposes of § 523(a)(4)
 15 Blyler v Hemmeter (In re Hemmeter), 242 F 3d 1186, 1190 (9th
 16 Cir 2001) (holding that "ERISA satisfies the traditional
 17 requirements for a statutory fiduciary to qualify as a fiduciary
 18 under § 523(a)(4)"), Clark v Glogower (In re Glogower), 320 Fed
 19 Appx 809, 811 (9th Cir 2009) (citing Hemmeter and holding that
 20 "[t]he bankruptcy court correctly determined that [the defendant]

21 _____
 22 9 First Amended Complaint to Determine Certain Debt to be
 23 Nondishchargeable, filed July 8, 2011 ("FAC") at ¶¶ 29-30 That
 24 the embezzlement and larceny claims are not as clearly stated as
 they might have been is a matter Bos apparently chose not to
 address at the pleading stage

25 10 See Anderson v Liberty Lobby, Inc., 477 U S 242, 248
 26 (1986) ("Factual disputes that are irrelevant or unnecessary will
 not be counted"), 11 Moore's Federal Practice, § 56.70[2]
 27 (Matthew Bender 3d ed) ("The court may limit its consideration to
 those matters identified in the motion on the ground all other
 28 parts of the case are outside the scope of the motion and not
 properly before the court ")

1 was a fiduciary for purposes of § 523(a)(4) because he was an
2 ERISA fiduciary"), Ninth Cir Fed R App P 32.1, Cantrell at
3 1127 n.6 (citing Hemmeter and 29 U.S.C. § 1002(21)(A)), and
4 holding that "ERISA fiduciaries qualify as fiduciaries within the
5 meaning of § 523(a)(4)"

6 Bos does not challenge this premise -- that a fiduciary
7 under ERISA is also a fiduciary for purposes of § 523(a)(4). His
8 argument is that he was not a fiduciary of the Trust Funds under
9 ERISA.

10 The statutory definition of a "fiduciary" under ERISA is, in
11 relevant part

12 "a person is a fiduciary with respect to a plan to the
13 extent (i) he exercises any discretionary authority or
14 discretionary control respecting management of such plan or
15 exercises any authority or control respecting management or
16 disposition of its assets, or (ii) he has any
17 discretionary authority or discretionary responsibility in
18 the administration of such plan " 29 U.S.C. § 1002(21)(A)

19 Thus, the Motion turns on whether Bos exercised authority or
20 control over the management or disposition of the assets of the
21 Trust Funds.¹¹

22 "The words of the ERISA statute, and its purpose of assuring
23 that people who have practical control over an ERISA plan's money
24 have fiduciary responsibility to the plan's beneficiaries,
25 require that a person with authority to direct payment of a

26 11 Under 29 U.S.C. § 1002(a), every employee benefit plan
27 must appoint "one or more named fiduciaries who jointly or
28 severally shall have authority to control and manage the
operation and administration of the plan." Alternatively, a
person can be a fiduciary if that person exercises the fiduciary
functions set forth in 29 U.S.C. § 1002(21)(A). Since it is
undisputed that Bos was not a "named fiduciary," the only
consideration for the court is whether Bos was a functional
fiduciary under 29 U.S.C. § 1002(21)(A).

1 plan's money be deemed a fiduciary " IT Corp v Gen Am Life
2 Ins Co, 107 F 3d 1415, 1421 (9th Cir 1997) "'Any' control
3 over disposition of plan money makes the person who has the
4 control a fiduciary " Id Thus, "a person with authority to
5 direct payment of a plan's money [is] deemed a fiduciary " Id

6 Bos contends he had no authority or control over the assets
7 of the Trust Funds because he "did not control how his
8 contributions would be spent, [and did not] make investment
9 decisions on behalf of the union "¹² Further, he argues, he could
10 not have been a fiduciary of the Trust Funds as to the unpaid
11 contributions because, until paid, required contributions are not
12 assets of the Trust Funds The Plaintiffs contend, on the other
13 hand, that the unpaid contributions due and owing to the Trust
14 Funds were assets of the Trust Funds, and that because Bos had
15 authority and control over the funds the Plaintiffs contend
16 should have been used to make the contributions, Bos had
17 authority and control over assets of the Trust Funds

18 The general rule is that an employer must have paid the
19 contributions over to the plan before the contributions become
20 assets of the plan Cline v Industrial Maint Eng'g &
21 Construction Co, 200 F 3d 1223, 1234 (9th Cir 2000) (holding
22 that "[u]ntil the employer pays the employer contributions over
23 to the plan, the contributions do not become plan assets over
24 which fiduciaries of the plan have a fiduciary obligation")
25 Courts recognize, however, that there is an exception to this
26 rule when the unpaid contributions are defined as plan assets by

27
28 12 Reply at 4 5-6

1 the agreement governing the plan ¹³

2 The record -- as developed by the Plaintiffs -- reflects the
3 following facts The Trust Funds are multi-employer benefit
4 plans established pursuant to trust agreements ¹⁴ The Trust Funds
5 are third-party beneficiaries of the CBA ¹⁵ The relevant language
6 in each of the trust agreements is that each Trust Fund "shall
7 consist of all Contributions *required* by the Collective
8 Bargaining Agreement or Subscriber's Agreement *to be made* for the
9 establishment and maintenance of the [respective plan] "¹⁶

10 Thus, because the respective trust agreements define plan
11 assets as those "required to be made," the Plaintiffs are
12 correct that unpaid contributions are plan assets for the
13 purposes of ERISA

14 Bos relies heavily upon In re Luna, 406 F 3d 1192 (10th Cir
15 2005) That case held that "the [trust fund's] contractual right

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17 13 Trustees of the S California Pipe Trades Health and
18 Welfare Trust Fund v Temecula Mech, Inc, 438 F Supp 2d 1156,
19 1165 (C D Cal 2006) (applying exception), Trustees of
20 Electrical Workers Health and Welfare Trust v Campbell, 2010 WL
21 582553 *3 (D Nev Feb 11, 2010) (citing Rahm v Halpin (In re
22 Halpin), 566 F 3d 286, 290 (2d Cir 2009) and noting that
23 "although the Ninth Circuit has not addressed the issue, other
24 circuits and district courts in the Ninth Circuit following the
25 Cline rule have recognized an exception where the agreement
26 governing the plan identifies unpaid employer contributions as
27 plan assets")

28 14 Opp, Declaration of Michael J Plommer ("Dec
Plommer"), Exh D

15 Opp, Dec Plommer, Exh C

16 Dec Plommer, Exh D, pt 1 at 10, Art II, Sec 1
(Health and Welfare Trust Fund Agreement), Exh D, pt 1 at 35,
Art II, Sec 1 (Pension Trust Fund Agreement), Exh D, pt 2 at
18, Art II, Sec 1 (Vacation and Holiday Trust Fund Agreement),
Exh D, pt 3 at 5, Art II, Sec 1 (Training Trust Fund
Agreement), Exh D, pt 3 at 30, Art II, Sec 1 (Annuity Trust
Fund Agreement) (emphasis added)

1 to the unpaid contributions is an 'asset' under ERISA," 406 F 2d
2 at 1201, but that fact alone does not make an employer a
3 fiduciary under ERISA as to unpaid contributions Id at 1203
4 (disagreeing with the proposition that "an employer automatically
5 becomes a fiduciary of an ERISA plan as soon as it breaches its
6 agreement to make employer contributions ") The court concluded
7 that the decision of the employer in that case to use limited
8 funds to pay other business expenses instead of making
9 contributions to ERISA funds was a "business decision" that did
10 not implicate fiduciary status 406 F 3d at 1207-08

11 Although there is no Ninth Circuit case directly on point,
12 in Northern Cal Retail Clerks Unions & Food Employers Joint
13 Pension Trust Fund v Jumbo Markets, Inc, 906 F 2d 1371 (9th
14 Cir 1990), the court held that "in taking on the obligation to
15 report the basis on which contributions will be made to an ERISA
16 fund, the employer undertakes a fiduciary obligation which must
17 be faithfully and punctiliously observed " 906 F 2d at 1373
18 The court also cited a district court decision as holding "that
19 pension funds do place trust and confidence in the employer-
20 contributors " Id, citing Seymour v Hull & Moreland
21 Engineering, 418 F Supp 190, 197 (C D Cal 1976) The Jumbo
22 Markets case is not directly on point here, but it is a strong
23 indication of the Circuit's view of the employer-trust fund
24 relationship Further, as indicated above, courts within the
25 Circuit have held that where the trust agreements define plan
26 assets as including unpaid contributions, as occurred here, the
27 employer bound to the agreements has a fiduciary duty as to those
28 contributions See note 13 above

1 It is undisputed that Bos was a member of the Modular
 2 Installers Association, an employer association, and was bound to
 3 the CBA through the CBA Addendum Pursuant to the CBA, employers
 4 who are parties thereto are obligated to make contributions,
 5 which constitute plan assets Under these circumstances, the
 6 court cannot conclude, as Bos would have it, that as a matter of
 7 law, he was not a fiduciary of the Trust Funds for purposes of §
 8 523(a)(4)

9 It is also undisputed that Bos was the owner, operator, and
 10 active participant in the management of a business known as BEI
 11 While Bos signed the CBA Addendum, he contends he signed it
 12 "solely in his capacity as president of BEI "¹⁷ The Plaintiffs
 13 have provided evidence which reveals that Bos signed the CBA
 14 Addendum in his capacity as president of the Modular Installers
 15 Association ¹⁸ Moreover, the Plaintiffs posit that one of Bos's
 16 other companies, Golden Express, was a member of the Modular
 17 Installers Association ¹⁹

18 Thus, a material fact remains as to whether Bos,
 19 individually, or on behalf of one of his business entities,
 20 became a signatory to and obligated under the CBA Addendum
 21 Significantly, there is no dispute that Bos personally agreed to
 22 be obligated for the outstanding contributions pursuant to a
 23

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 25 ¹⁷ Motion at 5 10, n 1 This representation conflicts
 26 with Bos's Statement of Undisputed Facts at ¶ 13 ("Bos was a
 member of Modular Installers Association and bound to a
 collective bargaining agreement with the Carpenters Union ")

27 ¹⁸ Opp , Dec Plommer, Exh B at 12

28 ¹⁹ Opp , Dec Plommer, Exh A


1 promissory note ²⁰ As indicated above, based on the evidence
2 presented, the court cannot conclude, as a matter of law, that
3 Bos had no authority or control over unpaid contributions due and
4 owing to the Trust Funds or that Bos was not a fiduciary of the
5 Trust Funds under ERISA, and therefore, under § 523(a)(4)

6 III CONCLUSION

7 For the reasons discussed above, Bos's Motion for Summary
8 Adjudication will be denied

9 The court will issue an appropriate order

10 Dated Jan 12, 2012

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12 ROBERT S BARDWIL
13 United States Bankruptcy Judge
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28 ²⁰ Bos's Statement of Undisputed Facts at ¶ 15, Opp , Dec
Plommer, Exh E